Honorable Patrick Oishi
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CASE #: 18-2-21872-1 SEA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

1426 FIRST AVENUE LLC, Plaintiff, v. CITY OF SEATTLE Defendant.	No. 18-2-21872-1 SEA CITY OF SEATTLE'S RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

The Plaintiff's Motion for Partial Summary Judgment ("Plaintiff's Motion") ignores that Ordinance 125650 ("the Ordinance") is temporary – effective for ten months. The Ordinance is authorized by the Growth Management Act's ("GMA") time out provision that allows the City of Seattle ("City") time to study the area adjacent to the Pike Place Market ("Market"). The GMA authorizes the City to maintain the *status quo* during the brief interim period so that the Showbox Theater ("Showbox"), with historical connections to the Market, is not lost while exploring longer term solutions. The City is studying the historical context of the Showbox and other properties on the east side of First Avenue adjacent to the Pike Place Market Historical District ("Historical District") to determine whether a permanent expansion is warranted.

The Plaintiff wrongly asserts that the Ordinance freezes its property ("Showbox site") "in time" and that the Ordinance creates an "arbitrary barrier to redevelopment."[1] To the contrary, the Ordinance is temporary and only lasts 10 months. Further, the Ordinance allows Plaintiff to submit an application for a Certificate of Approval ("COA") to the Market Historical Commission ("Commission") during the 10-month life of the Ordinance. The Plaintiff has not done so, therefore, no quasi-judicial permit review process was initiated by the Plaintiff, or anyone else, related to the Showbox site.

The Court should uphold the Ordinance and dismiss the Plaintiff's lawsuit. The procedural claims should be dismissed because the Ordinance's enactment was a legislative action adopted under the laws and procedures established in RCW 36.70A.390. Because the GMA-authorized legislative process was all the process due to the Plaintiff, the procedural due

[1] *See* Plaintiff's Motion, p. 5, line 5-6; *See* also Plaintiff's Motion, p. 4, line 9-10.

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process claim fails. Likewise, the Plaintiff's appearance of fairness statute claim fails because the appearance of fairness statute does not apply to legislative actions.

The Plaintiff mistakenly asserts that the Ordinance was a quasi-judicial zoning action entitling the Plaintiff to specific notice and procedures for an administrative quasi-judicial process. To the contrary, the Ordinance is not quasi-judicial because neither the Plaintiff, nor anyone else, submitted an application to the City requesting a project permit – a prerequisite for a quasi-judicial action. Further, the Ordinance is not a zoning action because the zoning classification of the Showbox was not amended by the City's action nor was the Official Land Use Map. Rather, the Ordinance's enactment was a legislative action that amended the Historical District development regulations, not the Showbox's zoning.

The Plaintiff's substantive claims fail because the Ordinance's enactment meets the highly deferential rational basis standard that governs the Plaintiff's substantive due process, equal protection, spot zoning, and first amendment claims. The Council rationally extended the Historical District to the Showbox site - the only property adjacent to the Historical District with a known historic connection to the Market and unique threat of redevelopment.

Even if the Court decided that the "undue oppression" test still applies in Washington despite it having no place in Federal law, the Plaintiff cannot carry its burden under the "undue oppression" factors. The factors favor the City: the loss of a culturally and historically significant structure before the City has time to assess long-term solutions is a serious problem; Plaintiff's Showbox site alone contributes to that problem; the regulation solves it by calling a GMA-authorized time-out; and Plaintiff suggests no less "oppressive" solution.

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II. COUNTER-STATEMENT OF FACTS

A. The Showbox site was purchased by Roger Forbes who began leasing the Showbox to AEG.

Roger Forbes purchased the Showbox site in 1997. The height limit for development was 240 feet. *See* Ordinance 112303. In 2006, the Showbox site was rezoned to maintain the height limit at 240 feet, and added bonus floor area from 290 feet to a maximum of 400 feet, depending on the public amenities included in the project. *See* Ordinance 122054. In 2017, the maximum bonus floor area went up to 440 feet. *See* Ordinance 125291.

On January 1, 2008, Plaintiff leased the Showbox to AEG Live NW, LLC ("AEG"). *Decl. Mitchell,* Ex. 1. The permitted use under the lease is "Music and entertainment club." *Id*. Sec. 2 (incorporating Section 1.1.9 of the original lease.)

B. The lease was extended until 2024, but Plaintiff notified AEG it will not extend or renew.

On September 1, 2013, the lease was extended until January 31, 2024. *Decl. Mitchell*, Ex. 2, Sec. 2. A new Section 32 was added allowing Plaintiff to terminate the lease as early as February 1, 2021 with a "Redevelopment Notice." *Id*. Sec. 5.

In an April 26, 2019 email, Plaintiff confirmed it sent notice to AEG that the lease "will not be extended or renewed at the expiration of its term." *Decl Mitchell*, Ex. 3.

C. The Showbox's ongoing landmark process is a process separate and apart from the Ordinance's enactment.

A landmarking action pursuant to chapter 25.12 SMC is separate and completely different from amending the Historical District boundary pursuant to chapter 25.24 SMC. A purpose of the Historical District is that "the cultural, economic, and historical qualities relating to the Pike Place Markets and the surrounding area. . . be preserved and encouraged." SMC 25.24.010.

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The purpose of the Landmarks Preservation Ordinance ("LPO") is to preserve, protect, enhance, and perpetuate historical landmarks, wherever they are in Seattle. SMC 25.12.020.

Since 1977, any person may nominate any site, improvement or object for designation as a landmark. SMC 25.12.370.A. A nomination containing adequate information is reviewed by the Landmarks Preservation Board ("Board") at a meeting to determine whether to "approve a nomination for further designation proceedings." SMC 25.12.380.

On August 8, 2018, Historic Seattle submitted a nomination to the Board for landmark designation of the Showbox. Historic Seattle's nomination was the first time the Board received a nomination for the Showbox.

At the June 5, 2019 nomination meeting, the Board approved Historic Seattle's nomination of the Showbox for landmark designation.

D. Plaintiff and Onni are still negotiating a deal.

Plaintiff contracted to sell the Showbox site to Onni Group ("Onni") in April 2018. Petition at 3.

In July of 2018, the contract was amended to allow Onni to terminate the purchase unless it received confirmation from Seattle Department of Construction and Inspections ("SDCI") that tower spacing regulations would allow its proposed tower, had Onni actually filed a permit application for review. *Decl. Mitchell*, Ex. 4 at Sec. 5.1. The amendment also allowed Onni to terminate unless, within 240 days from July 2018, the Showbox had "been determined to be ineligible to be designated as a landmark by an affirmative vote of the Landmark Preservation Board. . . ". *Id.* at Sec. 5.2.

A detailed account of the news report regarding the threat of loss of the Showbox, the overwhelming heartfelt response from the community concerned over the potential loss, and the

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legislative process that resulted in the Ordinance's enactment is provided in the Second Declaration of Lish Whitson. The purpose of the Ordinance is expressed within Ordinance itself. The Ordinance is unambiguous. Legislative intent is irrelevant, and certainly not derived from a former staffer's internal briefing.[2]

On November 6, 2018, Plaintiff's broker Bob Watson ("Broker") sent Plaintiff (Roger Forbes) an email indicating that Onni was willing to "stay under contract for up to 4 yrs." Decl. Mitchell, Ex. 5.

Onni sent Plaintiff a termination notice dated December 28, 2018. Decl. Mitchell, Ex. 6. Broker emailed Plaintiff December 28, 2018 to explain Onni "still would like to get back under contract." Decl. Mitchell, Ex. 7.

III. ARGUMENT

A. The legislative process was all the constitutional procedural due process required.

1. The Plaintiff ignores the GMAs plain letter authority.

The GMA allows the City to amend its development regulations by implementing interim official controls. An action enacting interim controls pursuant to RCW 36.70A.390 provides adequate due process so long as the process was proper under the applicable law and procedure, and the legislative body held its public hearing within 60 days after the fact. *Samson v. City of Bainbridge Island,* 683 F.3d 1051, 1060 (9th Cir.2012).

RCW 36.70A.390 governs the law and procedure for adopting interim official controls on an expedited basis, without public notice or hearing, if the local jurisdiction provides notice of, and conducts, a public hearing within 60 days of the ordinance. RCW 36.70A.390. *See Matson v.*

[2] Plaintiff's Motion, p. 4, lines 15-17 (citing Tondini Decl. Ex. 22 at 2).

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Clark County Bd. Of Com'rs, 79 Wn. App. 641, 646-49, 904 P.2d 317 (1995) (finding no due process violation where the local jurisdiction followed the process provided by RCW 36.70A.390).

Because the City provided the process due under the GMA, Plaintiff's procedural due process claim fails.

The Plaintiff complains that it did not receive direct notice of the August 8 Committee meeting and the August 13 Council meeting but cites no authority to support its assertion that such individualized notice was required for those meetings, beyond the standard legislative notice.[3] To the contrary, plaintiffs in *Samson* and *Matson* complained of not receiving direct notice prior to legislative action pursuant to RCW 36.70A.390, both asserted procedural due process violations that failed because RCW 36.70A.390 authorizes legislative action in advance of a public hearing so long as one is held within sixty days of the legislative action.

Plaintiff admits it received adequate notice of the September 19, 2018 public hearing, within 60 days of August 13 as authorized pursuant to RCW 36.70A.390.[4]

2. The Ordinance was not a decision on a rezone application that entitled Plaintiff to quasi-judicial process, it was a historic preservation action under Title 25 SMC.

The Ordinance was a historic preservation action under Title 25 SMC, not a zoning action under Title 23 SMC. The Plaintiff attempts to squeeze a square peg into a round hole when it incorrectly asserts that the City's quasi-judicial procedures should apply to the Ordinance.[5] Title 23 is inapplicable to the Ordinance because, first and foremost, no rezone application was

[3] Plaintiff's Motion, p. 22, line 13-17.

[4] Plaintiff's Motion, p. 22, line 17-19.

[5] Plaintiff's Motion, p. 24-25.

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submitted to the City. Also, the Ordinance does not amend the Official Land Use Map or the underlying zoning classification of the Showbox site.

a. An application is a prerequisite to a quasi-judicial land use decision, such as a rezone.

Plaintiff mistakenly asserts the City failed to comply with code sections in Title 23 applicable only to quasi-judicial permit review. Because the Ordinance was not a decision on an application, those code sections do not apply.

In Seattle, rezones are governed by Chapter 23.34 SMC – Amendments to Official Land Use Map. "Rezone" is defined to mean an amendment to the Official Land Use Map "to change the zone classification of an area." SMC 23.84A.032"R."[6] Seattle's definition of "rezone" is consistent with Washington's common law on zoning actions. *See Cathcart-Maltby-Clearview Comm'ty Coun. v. Snohomish Cy.*, 96 Wn.2d 201, 212, 634 P.2d 853 (1981)(A zoning action occurs when there are specific parties requesting a zoning classification change to specific property).

In Seattle, rezone applications are processed by SDCI. SDCI has issued departmental guidance for rezones. *See Decl*. *Mitchell,* ex. 8. Tip 228 provides that "[A]ny property owner or other interested party may initiate **a request for a rezone, which is an amendment to the City's Official Land Use Map**. This process is described in the Land Use Code as a quasi-judicial **rezone application.**" *Id*. Emphasis added. Tip 228 demonstrates that submitting a rezone application to SDCI is the required first step to initiate the City's quasi-judicial rezone process. Because no application was made by Plaintiff or anyone else to rezone the Showbox site, no quasi-judicial rezone application process was initiated.

[6] :"Rezone" is not defined in SMC 23.76.004(C) as asserted by Plaintiff.

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Plaintiff's attempt to jam a square peg into a round hole is evidenced by Plaintiff's citation to Title 23 notice requirements that apply only to quasi-judicial applications. For instance, SMC 23.76.012.A.2 governs notice requirements for when "an application" is submitted to SDCI and determined complete. SMC 23.76.042 governs "notice of application" for Type IV Council land use decisions. Likewise, SMC 23.76.052 governs the process for review of a Type IV Council land use decision indicating that the Hearing Examiner shall conduct its open record predecision hearing and recommendation "on all applications for Type IV Council land use decisions."[7] The notice provisions and quasi-judicial processes cited by Plaintiff apply only when an application for a Type IV rezone is submitted to SDCI for review. No such application was submitted for the Showbox site.

The Plaintiff erroneously states that SMC 23.76.004(C) defines rezones, it does not.[8] To the contrary, SMC 23.76.004(C) explains that Type IV decisions are "quasi-judicial decisions made by the Council "pursuant to existing legislative standards" and "based upon the Hearing Examiner's record and recommendation." Clearly, the Ordinance's enactment was not "pursuant to existing legislative standards." Rather, the Ordinance amended legislative standards by amending the Historical District development regulations in Chapter 25.24 SMC. Further, the Plaintiff presents no evidence that the Hearing Examiner should have been involved in the determination of the appropriate boundaries of the Historical District, previously a policy-making legislative exercise. See 23.76.004(C)(requiring Type IV decision to be based upon the Hearing Examiner's record and recommendation).

[7] Plaintiff's Motion, p. 25, lines 4-5.

[8] *See* Plaintiff's Motion, p. 24, lines 16-17.

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b. The Ordinance did not amend the City's Official Land Use Map or the underlying zoning classification of the Showbox.

The Ordinance does not meet the definition of "rezone" and is not a zoning action because it did not amend the City's Official Land Use Map or the underlying zoning classification of the Showbox site. SMC 23.84A.032"R". The Official Land Use Map includes the zone classifications of properties in Seattle, as well as establishes the overlay districts that are regulated in Part 3 of Title 23. See SMC 23.32.006-010; See also SMC 23.59 – 23.75 (the overlay districts regulated in Part 3 of Title 23).

The Historical District is not an overlay district that is regulated in Part 3 of Title 23. See SMC 23.59 – SMC 23.75. Rather, the Historical District is governed by SMC 25.24, which does not direct the Historical District boundaries to be included in the Official Land Use Map. Plaintiff's citation to SMC 23.76.036(A)(1) is inapplicable because the section only applies to amendments of the City's Official Land Use Map. The underlying zoning classification of the Showbox site was and still is Downtown Mixed Commercial ("DMC") 240/290-440 and all applicable downtown zoning controls established in chapter 23.49 SMC for that zoning classification still apply to the Showbox site.

Compare the legislative expansion of the Historical District with two actual Type IV Council rezone decisions made around the same time. *See Decl Mitchell*, Ex's 9 -10. The two decisions were made on July 30, 2018 and August 6, 2018, respectively, days before the Ordinance's enactment. The two decisions both clearly state that they relate to land use and zoning "amending Chapter 23.32 of the Seattle Municipal Code" and that the decisions stemmed from an application to rezone specific property and the title identifies the respective applicants. These are just examples of how a City Council quasi-judicial decision is processed in Seattle and what the final decision in the form of an ordinance looks like that amends the underlying zoning

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classification of the property involved and amends the Official Land Use Map to reflect that change.

c. The Ordinance is a historic preservation action.

The Ordinance is a historic preservation action, not a rezone action. The City's historic preservation regulations are in Title 25. The Ordinance was enacted pursuant to Chapter 25.24 SMC, the regulations that govern the Historical District. The Historical District was established in 1971. *See Decl. Mitchell*, Ex. 11. The boundaries of the Historical District were established by map as described in SMC 25.24.020. In 1986, the boundaries of the Historical District were amended by legislative action to include Victor Steinbrueck Park. *See Decl. Mitchell*, Ex. 12. The boundaries were amended again in 1989 through legislative action to include property known as the PC-1 (Planning/Commercial Area 1) Site. *See Decl. Mitchell*, Ex. 13. None of the ordinances that created and later amended the boundaries of the Historical District made any reference to "land use and zoning" or to "amending Chapter 23.32" - the Official Land Use Map. This is because they were legislative actions furthering historic preservation, not quasi-judicial rezones.

This is true even though the legislative boundary expansion included just one property. *See Westside Hilltop Survival Comm. ("WHSC") v. King Cy*, 96 Wn.2d 171, 176, 634 P.2d 862 (1981)(site-specific revision to a community plan was determined a legislative act even though there were identifiable interests); *See also Harris v. Hornbaker*, 98 Wn.2d 650, 658-59, 658 P.2d 1219 (1983)(determining where to place a highway interchange was a distinctly legislative decision even though two readily identifiable competing interest groups were involved in the public hearing process because the responsibility was not to decide which of the two groups made the best argument; but rather to decide which interchange location was in the best interest of the county). Although legislative decisions may appear adjudicatory when groups focus on how the

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particular decisions will affect their individual rights, all policy decisions begin with the consideration and balancing of individual rights. *Harris*, at 659, 658 P.2d 1219.

The Ordinance's enactment is separate and apart from the landmarking process governed under chapter 25.12 SMC.

Plaintiff mistakenly asserts that notice provisions in the landmarking process, specifically SMC 25.12.380-580, should have been followed.[9] Plaintiff is wrong because Ordinance 125650 did not seek to designate the Showbox as a landmark. The Landmarks Ordinance is inapplicable.[10]

Historic Seattle, not the City, submitted a nomination to the Board on August 8, 2018 to designate the Showbox as a landmark. This initiated a landmarking process separate from the Ordinance's enactment to extend the boundaries of the Historical District. The Board recently approved the nomination for further designation proceedings. See 25.12.390.

3. The Court has already ruled that the Ordinance's enactment is not a land use decision appealable under LUPA.

This Court has already ruled the Council's action was not a land use decision and dismissed Plaintiff's LUPA claims because the Ordinance was not a decision on an application for a project permit. See Court Order dated October 19, 2018.[11]

For the same reason, this Court should also rule the Ordinance's enactment was not entitled to quasi-judicial notice and process because it was not the final decision at the end of a quasi-

[9] *See* Plaintiff's Motion, p. 25, lines 5-7.

[10] Since 1977 when the LPO was first enacted in Seattle, it provided that "any person" may nominate any site, improvement or object "for designation as a landmark." SMC 25.12.370; See also Ord. 106348, §4.01.

[11] In so holding, Judge Roberts also rejected the applicability of *Schnitzer*, at least arguably so).

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judicial permit review process. There was no application that trigger such a process. Because the Ordinance is not a land use decision, it cannot be a quasi-judicial decision.

4. The cases cited by Plaintiff are distinguishable.

The cases cited by Plaintiff are distinguishable, and do not demonstrate the City erred by following the GMA-authorized legislative process rather than quasi-judicial procedures.[12] First, none of the cases cited by Plaintiff discuss GMA's RCW 36.70A.390. This is critical because RCW 36.70A.390 establishes an exception to the typical public participation process, allowing legislative action before a public hearing. For this reason, the general rules that require notice and an opportunity to be heard prior to legislative action simply do not apply when the action is taken under RCW 36.70A.390. See *Samson*, 683 F.3d at 1060 (9th Cir.2012).

Second, the cases are distinguishable because the due process problems all involved defects in the notice provided to make the notice cryptic and misleading or factually incorrect. In *Responsible Urban Growth Group ("RUGG") v. City of Kent*, 123 Wn.2d 376, 868 P.2d 861 (1994), a corporate landowner requested (by threat of litigation) a change in zoning classification under the guise of a legislative zoning correction. *Id*. The Council took action without providing required notice, only providing a cryptic reference on the council's summary agenda. *Id*.

The procedural due process problem in *Barrie v. Kitsap County*, 84 Wn.2d 579, 527 P.2d 1377 (1974), was that the Court found the published notice of the public hearing defective because the Court found it misled the citizenry into believing that the rezone and PUD were one proposal to be considered together and not separately and that the rezone was the exclusive purpose of a PUD development. *Barrie*. Wn.2d at 584, 527 P.2d 1377 (1974).

[12] Plaintiff's Motion, p.23, line 21.

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In *Prosser Hill Coalition v. County of Spokane*, 176 Wn. App. 280, 309 P.3d 1202 (2013), notice was found to be defective because the posted notice required by the permit review process was inadequately placed on a less traveled dirt road rather than on the paved thoroughfare, and because the notices listed an inaccurate description of the property subject to the CUP application. *Prosser Hill Coalition*, 176 Wn. App. at 290-292, 309 P.3d 1202 (2013).

Because no zoning application was submitted by Plaintiff or anyone else regarding the Showbox site, the quasi-judicial contested cases are irrelevant because the notice and process required for quasi-judicial actions is different than the process for legislative actions, especially legislative actions taken pursuant to RCW 36.70A.390.

The procedural due process problems in the cases involved notice defects such as the cryptic notice and failure to provide required notice in *RUGG*, misleading published notice in *Barrie*, and misplaced posted notice and factual errors included on the notice in *Prosser Hill*. Unlike these cases, the notice of public hearing was provided directly to the Plaintiff, as well as posted in the City's Land Use Bulletin and posted in the Daily Journal of Commerce. The notice of public hearing was clear and without defect, and sufficiently apprised the Plaintiff and other interested persons as to the contemplated action to expand the Historical District to the Showbox site. *See Second Decl. Whitson*.

The fourth case, *Berst v. Snohomish County*, 114 Wn. App. 245, 57 P.3d 273 (2002), is completely irrelevant because it analyzed unrelated provisions in the Forest Practices Act that authorized imposing a building moratorium as a punishment for unlawful timber practices. In *Berst*, the county erroneously imposed the punishment on Berst without providing Berst an opportunity to challenge the punishment that resulted in an unfavorable decision on a permit application. *Berst*, 114 Wn. App. at 254-255, 57 P.3d 273 (2002). Unlike in *Berst*, the process to

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allow swift adoption of interim official controls authorized by GMA's RCW 36.70A.390 ensures that a public hearing will be provided, shortly after legislative action is taken.

Here, the public overwhelmingly participated in the process as the City received thousands of public comments and letters from interested stakeholders, including a comment letter from the Plaintiff prior to the Ordinance's enactment. *See 2nd Decl. Whitson*, Ex. 4. Also, agendas of the August 8 committee meeting and August 13 full council meeting provided clear notice legislative notice of the proposal to expand the Historical District. *Decl. Mitchell*, Ex's 12 and 13.. The Plaintiff was provided the notice due under RCW 36.70A.390 and an opportunity to be heard. In fact, Plaintiff participated by submitting written comments opposing the proposal a day before the legislative action, and had the opportunity to comment at that meeting. Notwithstanding that RCW 36.70A.390 did not require the City to provide direct notice of the August 8 and August 13 meetings to Plaintiff, Plaintiff was not prejudiced because Plaintiff did participate and comment during the process. *Pease Hill Cmty. Grp. V. Cnty. of Spokane*, 62 Wn. App. 800, 807, 816 P.2d 37 (1991); *See also* Second Decl. Whitson, ex. 4.

The Arizona case *Jachimek v. Super Ct.*, 169 Ariz. 317, 819 P.2d 487 (1991) is inapplicable in Washington because it does not appear to allow any overlay districts in Arizona. The Court held overlay districts violate an Arizona statute requiring general conformity among properties with same zoning. *Id.* In Washington, overlay districts, are clearly allowed. *Feil v. Eastern Washington Growth Management Hearings Bd.*, 153 Wn. App. 394, 405, 220 P.3d 1248 (2009)(An action regarding an overlay district was not a rezone because no change was made to the underlying zoning classification or official land use map. *Feil v. Eastern Washington Growth Management Hearings Bd.*, 153 Wn. App. 394, 409, 220 P.3d 1248 (2009).

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B. Plaintiff fails to carry its burden of proving the Ordinance violates substantive due process guarantees.

The City and Plaintiff agree Washington follows the federal due process analysis because the Washington and U.S. Constitutions provide the same substantive due process right. *See* Pl. Mot. at 13. That analysis is "rational basis," not "undue oppression."

1. The "rational basis" analysis governs Plaintiff's substantive due process claim.

Where a challenged law implicates no fundamental right or interest, federal courts have long applied the "rational basis" analysis. *E.g., Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1943); *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938); *United States v. Blodgett*, 872 F.3d 66, 69 (1st Cir. 2017); *Reyes v. North Tex. Tollway Auth.*, 861 F.3d 558, 561 (5th Cir. 2017); *Goodpaster v. City of Indianapolis*, 736 F.3d 1060, 1071 (7th Cir. 2013); *Yagman v. Garcetti*, 852 F.3d 859, 866-67 (9th Cir. 2017); *Blue Martini Kendall, LLC v. Miami Dade County*, 816 F.3d 1343, 1351 (11th Cir. 2016).

Plaintiff fails to carry its burden under the deferential "rational basis" analysis by offering one conclusory sentence in a footnote. Pl. Mot. at 17 n.6. For the reasons the City explained in its motion, the City prevails under "rational basis."

2. Plaintiff misrepresents federal and Washington law.

Plaintiff cites a 1928, *Lochner*-era decision for the proposition that courts wield the due process clause to cull "unnecessary and unreasonable" laws. Pl. Mot. at 13 (citing *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928) (relying on *Adams v. Tanner*, 244 U.S. 590, 594 (1917), and *Burns Baking Co. v. Bryan*, 264 U.S. 504, 513 (1924)). Plaintiff overlooks the Court's admonition in 1963 that such authority died with the *Lochner* era, "a time

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when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable . . . ." *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963). *See id.* at 728-32 (abrogating *Adams*, *Burns*, and similar *Lochner*-era case law).

Plaintiff also claims *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), announced a "substantially advances" test. Pl. Mot at 13. *Euclid* never uttered "advance"; it is one of the original "rational basis" decisions, still cited as the source of that analysis. *E.g.*, *Greater Chicago Combine and Center, Inc. v. City of Chicago*, 431 F.3d 1065, 1071 (7th Cir. 2005); *Kim v. United States*, 121 F.3d 1269, 1273–74 (9th Cir. 1997); *Gamble v. City of Escondido*, 104 F.3d 300, 307 (9th Cir. 1997); *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1211 (10th Cir. 2009). "Substantially advances" was a concept limited to, and ultimately ejected from, federal regulatory takings law by a decision that also explained "substantially advances" has no place in substantive due process law. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540–45 (2005).

Plaintiff cites no modern-era federal authority embracing the three-part "undue oppression" analysis Plaintiffs tout. None exists.

Instead, Plaintiff misrepresents Washington law for support. Plaintiff ignores *Amunrud v. Board of Appeals*, 158 Wn.2d 208, 225-30, 143 P.3d 571 (2006), which rejected "undue oppression" in favor of "rational basis," and that the Washington Supreme Court has applied only the "rational basis" analysis since *Amunrud*. *E.g.*, *Dot Foods, Inc. v. State, Dept. of Revenue*, 185 Wn.2d 239, 372 P.3d 747 (2016); *In re Detention of Morgan*, 180 Wn.2d 312, 324, 330 P.3d 774 (2014). The Washington Court of Appeals has also used the "rational basis" analysis since *Amunrud*. *E.g.*, *State v. Shelton*, 194 Wn. App. 660, 666-67, 378 P.3d 230 (2016);

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Nielsen v. Washington State Department of Licensing, 177 Wn. App. 45, 53, 309 P.3d 1221 (2013).

But *Amunrud* did not overrule case law—which Plaintiffs invoke—issued during a two-decade period when the Washington Supreme Court applied "undue oppression" to federal and Washington claims on the mistaken belief it was the federal analysis. *See* Pl. Mot. at 13-14.[13] Because "undue oppression" remains on the books, the Washington Court of Appeals has also mistakenly invoked it after *Amunrud*. *E.g.*, *Greenhalgh v. Department of Corrections*, 180 Wn. App. 876, 892, 324 P.3d 771 (2014); *Cradduck v. Yakima County*, 166 Wn. App. 435, 446–451, 271 P.3d 289 (2012).

The Washington Supreme Court is reviewing two cases to clarify the confusion. *Yim v. City of Seattle*, Wash. Supreme Ct. No. 95813-1 ("*Yim I*"); *Yim v. City of Seattle*, Wash. Supreme Ct. No. 96817-9 (certification from the U.S. District Court for the Western District of Washington). The Court will hold argument on both cases June 11.

This Court should apply the "rational basis" analysis, as the Washington Supreme Court has since 2006. Plaintiff gains nothing from the *Yim I* trial court decision applying "undue oppression." *See* Pl. Mot at 14, 18. The Supreme Court will have the final say in *Yim I*. Even if trial court rulings had precedential value, *see Oltman v. Holland America Line USA, Inc*., 163 Wn.2d 236, 248 178 P.3d 981 (2008) ("trial court rulings are not precedential"), Plaintiff overlooks a more recent trial court ruling applying the "rational basis" analysis. *Rental Housing Ass'n v. City of Seattle*, King Cnty. Super. Ct. No. 17-2-13662-0 SEA ("*RHA*"), Order Granting

[13] Plaintiffs also cite *Manufactured Housing Cmtys. of Wash. v. State*, 142 Wn.2d 347, 13 P.3d 183 (2000), but it involved no due process claim. *Id*. 142 Wn.2d at 356 n.5 (plaintiffs "voluntarily dismissed their substantive due process claim").

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City of Seattle's Cross Motion for Summary Judgment and Denying RHA's Cross Motion for Summary Judgment at 9-11 (Sept. 19, 2018) (copy attached as Exhibit 16 to *Decl. Mitchell*).[14]

3. If this Court applies "undue oppression," it should rule Plaintiff has not carried its burden or allow the City further discovery.

Even if the three-part "undue oppression" analysis applied, Plaintiff could not prove a violation beyond a reasonable doubt. *See Girton v. City of Seattle*, 97 Wn. App. 360, 363, 983 P.2d 1135, 1140 (1999) (burden of proof). First, the Ordinance is aimed at achieving a legitimate public purpose: as the Growth Management Act allows, calling a temporary time-out to preserve the *status quo* so the Council can consider longer-term options.

Second, the Ordinance uses means reasonably necessary to achieve its purpose. The Council could have imposed a moratorium under the GMA, but instead temporarily extended the Historical District boundary so any proposed development would first undergo review to enhance consistency with the Historical District. It does not matter that the Council did not also extend the boundary to other adjacent properties; no other potentially historically significant adjacent property was in danger of redevelopment so a GMA-authorized time-out was not needed for them. *Cf.* Pl. Mot at 15.

Finally, Plaintiff cannot carry its burden under the "undue oppression" factors. The public-side factors favor the City: the loss of a culturally and potentially historically significant structure before the City can assess long-term solutions is a serious problem; Plaintiff's land alone contributes to that problem; the regulation solves it by calling a GMA-authorized time-out; and Plaintiff suggests no less "oppressive" solution. Plaintiff instead invents and attacks a goal

[14] RHA voluntarily dismissed its appeal of that ruling. *RHA v. City of Seattle*, Wash. St. Ct. App. Div. I No. 79093-5-1, Court Administrator/Clerk Ruling Dismissing Appeal (Dec. 21, 2018) (copy attached as Ex. 17?[] to *Decl. Mitchell*).

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for the Ordinance; it is not intended primarily to preserve a concert space, just to preserve the *status quo* to consider longer-term approaches. *Cf*. Pl. Mot. at 16.

Plaintiff ignores the crucial factor: the Ordinance's temporary nature. Ignoring reality, Plaintiff assumes the Ordinance is permanent. Plaintiff also assumes it cannot develop anything while the property remains in the Historical District, but this Court has already rejected that notion when granting the City summary judgment on Plaintiff's takings claim because, until Plaintiff submits an application to develop under Historical District guidelines, Plaintiff cannot claim it is precluded from pursuing certain uses or erecting certain structures. *See* Order Granting In Part and Denying In Part City of Seattle's Motion For Partial Summary Judgment, Bifurcating Monetary Claims, and Amending Case Schedule at 2.

Despite Plaintiff's claim that the Ordinance killed the deal with Onni, the Ordinance did not kill the deal. Rather, the purchaser withdrew because an express contractual condition had not been timely satisfied. *See* Decl. Mitchell, Ex. 6. Plaintiff has not shown that the contractual condition was or would likely have been satisfied but for the Ordinance. To the contrary, there is no evidence that any steps were taken to satisfy the MUP condition.

Further, and in any event, the deal is not dead. The Ordinance is temporary. Before cancelling the contract, Onni expressed an interest to "stay under contract for up to 4 years." *Decl. Mitchell*, Ex. 5. Moreover, in cancelling the contract the purchaser expressly stated it was submitting the cancellation to avoid its purchasing obligations pending resolution of land use issues and that it "would still like to get back under contract." *Decl. Mitchell*, Ex. 7

If that is not enough to rule in the City's favor under "undue oppression," then the appropriate ruling would be to deny summary judgment because more discovery and expert analysis would be needed to assess the remaining factors. What is the amount and percentage

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loss in land value from a temporary development regulation? What are the prospects of Plaintiff awaiting a permanent regulatory approach, and what revenue will it enjoy during that period? Even if the property were to remain in the Historical District permanently, what are the financial implications of building a new structure around and above the existing one in a way that preserves attributes relevant to the Historical District? The City and Court cannot assess those questions without presenting witnesses at trial.

The "similar" cases Plaintiff cites are distinguishable. *See* Pl. Mot. at 17-18. *Sintra v. City of Seattle*, 119 Wn.2d 1, 7 n.1, 22, 829 P.2d 765 (1992), involved a law combatting homelessness by requiring developers to either replace the low-income housing they destroyed or pay a fee for such housing. *Guimont v. Clarke*, 121 Wn.2d 586, 610-11, 854 P.2d 1 (1993), addressed a lack of low-income housing by forcing mobile home park owners to pay their tenants' relocation costs. Both decisions found a violation under the "undue oppression" analysis because the plaintiffs' property could not be singled out as contributing significantly to homeless or a lack of low-income housing. *Sintra*, 119 Wn.2d at 22; *Guimont*, 121 Wn.2d at 610-11. Here, only Plaintiff's property contributes to the problem addressed by the City's GMA-authorized time-out.[15]

C. Plaintiff fails to carry its burden of proving the Ordinance violates equal protection guarantees.

1. Rational basis review applies.

Because the Ordinance does not implicate a suspect classification or a fundamental right, rational basis is the correct standard of review. *Convention Ctr. Coalition v. City of Seattle*, 107

[15] Plaintiff also cites authority about ripeness, an issue the City does not raise. Pl. Mot. at 18. Plaintiff also invokes the trial court *Yim I* ruling without noting it is on appeal, lacks any precedential value, and is countered by the *RHA* trial court ruling applying the "rational basis" analysis.

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Wn.2d 370, 378, 730 P.2d 636 (1986). Plaintiff asserts that its fundamental rights are implicated by the Ordinance because it "moves fundamental ownership control away from the owner" and places it with the Commission. *Pl. Mot.* at 19-20. Plaintiff's argument fails.

Plaintiff ignores the critical fact that the Ordinance is temporary. The Ordinance expires on July 23, after which the Historical District boundaries revert back and the Market Historical Commission Guidelines ("Guidelines") would no longer apply. The Ordinance does not prohibit or interfere with the current use as a "music and entertainment club" because SMC 25.24.060.A protects the "existing building, structure, or use" from new regulations. The current lease allows AEG to continue its use until at least 2021, if not 2024. *See Decl. Mitchell*, Ex. 2. Any future change in tenancy would occur only after the Ordinance expired. This is true even if the City renewed the Ordinance's effective date for six months until January 23, 2020. Because of this, any future change in tenancy would not be subject to the Guidelines per the Ordinance. Plaintiff is wrong when it asserts otherwise. *Pl. Mot.* at 8.

Plaintiff provides no evidence that its ownership control of the Showbox site is replaced by the Commission. Plaintiff continues to own the property and make controlling decisions evidenced by Plaintiff's letter to AEG deciding not to renew the lease. *Decl. Mitchell*, Ex. 3. Plaintiff can submit a Certificate of Approval application to the Commission for its review and approval. Plaintiff has chosen not to do so, it is premature for Plaintiff to claim its fundamental rights were infringed. Plaintiff cannot point to any specific Guideline that would necessarily require denial of any requested changes. Guideline 2.5 establishes a priority of uses that would be applied to any change of use application, indicating housing and retail to be of high priority. Guideline 2.6 would apply in the review of a change of ownership. The Commission does not dictate what the use should be, or who the buyer should be, it simply reviews permit applications

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for consistency with guidelines. To preserve the historic "meet the producer" authenticity of the Market, it is important for the Commission to review applications for changes in use and ownership, to ensure the historic area does not become "theme-parked", so that its world-famous authenticity is maintained.

2. The Ordinance's inclusion of only the Showbox is reasonably justified.

Plaintiff's equal protection claim fails because Plaintiff has not shown proof that the City intentionally treated it differently from others similarly situated and that there is no rational basis for the difference in treatment. *Village of Willowbrook v. Olech*, 528 U.S.562, 564, 120 S.Ct. 10763, 145 L.Ed.2d 1060 (2000). Plaintiff makes two arguments in its attempt to defeat the rational basis test under equal protection. Plaintiff first argues that other concert spaces in Seattle should have been included in the Ordinance. This argument fails because the Ordinance temporarily expanded the Historical District to include the Showbox because of the historical connection of the Showbox and the Market. No other concert spaces are adjacent to and share a historical connection with the Market, as well as threatened by redevelopment. Therefore the other concert spaces are not similarly situated properties.

Second, Plaintiff asserts that because the City offered to purchase properties within the Historical District back in the 1970's, that the City is bound to make the same offer to the Plaintiff before the Showbox site can be included within the Historical District. Plaintiff is wrong. Today's real estate market is much different from the 1970's, and the difference of 50 years makes the Showbox site not similarly situated as the properties that were made that offer in the 1970's. Nothing compelled the City to offer to acquire the properties within the Historical District in the 1970's, just as nothing compels the City to do so now.

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D. The enactment of the Ordinance is not unlawful spot zoning.

1. The Ordinance's enactment was not an unlawful spot zone because it was not a zoning action.

The Ordinance is not a spot zone because the Ordinance is not a zoning action, a prerequisite to a spot zone. *See Save Our Rural Env't ("SORE") v. Snohomish County*, 99 Wn.2d 363, 368, 662 P.2d 816 (1983)(Spot zoning is defined as a zoning action.). The Ordinance did not amend the City's Official Land Use Map, nor did it amend the underlying zoning classification of the Showbox site and does not meet the definition of "rezone." SMC 23.84A.032"R". The Ordinance also had nothing to do with a decision on rezone application, a pre-requisite to a rezone as shown by SDCIs Tip 228. Decl. Mitchell, Ex. 8.

2. In Washington, a spot zone is only unlawful if it is inconsistent with the classification of surrounding land and not in accordance with the City's comprehensive plan.

Plaintiff's Motion ignores the consistent rule in Washington that a spot zone is a zoning action by which a smaller area is singled out of a larger area or district and specifically zoned for a use classification totally different from and inconsistent with the classification of surrounding land and not in accordance with the comprehensive plan." *Smith v. Skagit County*, 75 Wn.2d 715, 743, 453 P.2d 832 (1969); *Bassani v. Board of County Com'rs for Yakima County*, 70 Wn. App. 389, 396, 853 P.2d 945 (1993). Courts have frequently held that a county's rezone will be overturned "[o]nly where the spot zone grant's a discriminatory benefit to one or a group of owners to the detriment of their neighbors or the community at large without adequate public advantage or justification." *Bassani*, 70 Wn. App. at 396, 853 P.2d 945 (1993).

First, the Ordinance's enactment does not grant a discriminatory benefit to the detriment of their neighbors or the community at large. Instead, the community at large is benefited by the

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City's action intended to add historic preservation regulations to the Showbox site while the City studies the issue to explore long term solutions.

Second, the action was consistent with the classification of surrounding land. The edge of the Historicl District stopped at the Showbox and an action to include an adjacent property into an existing district is usually not found to be a spot zone. *Salkin,* American Law of Zoning Sec 6:18; See also *McNaughton v. Boeing*, 68 Wn.2d 659, 414 P.2d 778 (1966)(Court upheld a decision to expand commercial zoned area into an adjacent property zoned for residential development).

Third, the Plaintiff has shown no evidence that the Ordinance's enactment was not in accordance with the comprehensive plan. In fact, several longstanding goals and policies regarding historic preservation and preservation of arts and culture are advanced by the Ordinance's enactment that are listed on page 23 of City's Motion for Summary Judgment.

3. All the cases cited by Plaintiff in support of its spot zone claim are distinguishable.

All the cases cited by Plaintiff are distinguishable and some come from outside states that have different land use laws than Washington**.**

Plaintiff cites *Pierce v. King County*, 62 Wn.2d 324, 382 P.2d 628 (1963), in which an application for a rezone to allow for a gas service station was granted in the heart of the residential district "at least six blocks in any direction", despite the rezoned property not being "contiguous to" nor an "extension of any other business property" in clear conflict with comprehensive planning policies that envisioned commercial activity "at the edge of the neighborhood." *Pierce*, 62 Wn.2d at 327-328, 382 P.2d 628 (1968).

Pierce is distinguishable. The Ordinance extended the Historical District boundaries to an adjacent property which was the critical fact missing in *Pierce*. Compare *Pierce* with *McNaughton v. Boeing*, 68 Wn.2d 659, 414 P.2d 778 (1966), in which the Court upheld a decision to expand

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commercial zoned area into an adjacent property zoned for residential development. According to *Salkin*, courts often do not find spot zoning when such action simply extends the boundaries of an existing district to include an additional parcel of land. *Salkin*, American Law of Zoning Sec 6:18. Second, unlike in *Pierce*, the Ordinance's enactment furthers a number of longstanding goals and policies in the City's comprehensive plan related to historic preservation and preservation of arts and culture. See City's Motion, p. 23.

Plaintiff next cites *Woodcrest Investments Corp. v. Skagit County*, 39 Wn. App. 622, 694 P.2d 705 (1985), that relied on outdated notions that a zoning action involving ten separate areas encompassing 1200 acres should be treated as quasi-judicial, and that the proponent of a rezone bore the burden to prove a substantial change from the original zoning, to overturn a zoning action. *Woodcrest*, 39 Wn. App. at 627, 694 P.2d 705 (1985). *Woodcrest* would be decided differently if the same facts were analyzed post 1995 regulatory reform. For instance, an appeal would have been to the Growth Management Hearings Board pursuant to the GMA, not the court, and the burden would have been on the property owners to prove clear error. See chapter 36.70A RCW.

Both *Sunderland Family Treatment Services v. City of Pasco*, 127 Wn.2d 782, 903 P.2d 986 (1995) and *Ross v. City of Yorba Linda*, 1 Cal. App. 4th 954, 2 Cal. Rptr. 2d 638 (1991) stand for the proposition that community opposition to a proposed application cannot alone justify a decision to deny the permit application, in lieu of applying existing regulations and policies, as was argued by the cities in those cases. Yet they recognize that opposition of the community may be given substantial weight.[16]

[16] Plaintiff's Motion, p. 11, line 19-20.

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Clearly it is appropriate to base policy decisions on careful consideration of public opinion. *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 245, 821 P.2d 1204 (1992). The outpouring of community concern regarding the threatened historical and cultural loss of the Showbox was overwhelming and the City considered these concerns when it took legislative action on August 13. The council bill was reviewed in council committee on August 8, 2018 in which a policy roundtable discussion was held. After deliberation, the committee members made a policy decision to amend the council bill. The City's action was justified by the findings of fact included on the face of the Ordinance. Clearly, the City did not use community opposition, as implied by cases the Plaintiff cites, as the sole justification for the Ordinance.

The Plaintiff next cites two inapplicable zoning action cases from Florida, despite Florida's land use laws being different from Washington's. Unlike Washington, Florida applies res judicata to zoning classification and has a top down state growth management statute requiring state approval for comprehensive plan amendments. *City of Miami Beach v. Robbins*, 702 So. 2d 1329, 1330 (Fla. Dist. Ct. App. 1997). Notwithstanding the different laws, *City of Miami Beach* is distinguishable because it involved a citywide rezone in which a few blocks were downzoned within a vast sea of similarly situated residential zoned property not downzoned, and without any justification for the difference. *City of Miami Beach*, 702 So. 2d at 1330. Similarly, *Private School, Inc. v. Village of Palmetto Bay*, 31 So. 3d 260 (Fla. Dist. Ct. App. 2010). involved a school who's rezone request was denied not because the application did not comply with existing laws and regulations, but because the local government unjustifiably did not want the school to be allowed to expand. *Private School, Inc*., 31 So. 3d 260 at 263. Lastly, in an unpublished New Jersey case Unlike *City of Miami Beach* and *Private School, Inc.*, the Ordinance's legislative enactment was

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justified by the City's longstanding historic preservation and arts and cultural preservation goals and policies.

IV. CONCLUSION

The Court should grant the City's Motion for Summary Judgment and dismiss this case. Plaintiff's procedural claims fail because the Ordinance's enactment complied in full with the laws and process established in RCW 36.70A.390 and the City action was legislative because the Ordinance amended development regulations pursuant to the GMA, rather than a quasi-judicial decision on a project permit application.

Likewise, Plaintiff's substantive claims fail because the Ordinance is justified. The GMA time-out provision authorized the City to adopt interim official controls to maintain the status quo so that the City could study the historical context of the area adjacent to the Historical District -and including only the Showbox site was justified because of its historical connection to the Historical District and its loss alone was uniquely threatened.

I certify that MS Word 2016 calculates all portions of this memorandum required by the Local Civil Rules to be counted contain 7965 words, which complies with the Local Civil Rules.

Respectfully submitted June 10, 2019.

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CERTIFICATE OF SERVICE

I certify that, on this date, I electronically filed a copy of City of Seattle's Response to Plaintiff's Motion for Summary Judgment, and the Declaration of Daniel B. Mitchell with Exhibits 1-18 with the Clerk of the Court using the ECR system.

I also certify that, on this date, I sent a courtesy copy of those documents by email to:

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DATED June 10, 2019.

s/Alicia Reise
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